UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

KARCHER ENVIRONMENTAL, INC.,

Employer

and Case 21-RC-20720

SOUTHERN CALIFORNIA DISTRICT
COUNCIL OF LABORERS' AND ITS AFFILIATED
LOCAL LABORERS' INTERNATIONAL
UNION OF NORTH AMERICA,
LOCAL UNION 300, LIUNA, AFL-CIO

Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Pursuant to a Stipulated Election Agreement approved on March 5, 2004, an election by secret ballot was conducted on April 2, 2004, among the employees of the Employer, in the unit agreed appropriate for the purposes of collective bargaining.[1] The tally of ballots, which was served upon the parties immediately following the election,

[1] "All full-time and regular part-time environmental workers, including asbestos, lead and toxic abatement workers, and mold remediation workers employed by the Employer in the Counties of Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern, San Diego, and including Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, Santa Catalina Island, San Miguel Island, Santa Barbara Island, San Clemente Island, Santa Rosa Island, Anacapa Island, and the Channel Island Monument, California out of the Employer's facility located at 2300 Orangewood Avenue, Anaheim, California; excluding all other employees, clerical employees, professional employees, managerial employees, technical employees, guards, and supervisors as defined in the Act."

The parties further stipulated to use the Daniel /Steiny formula for voter eligibility:
"In addition, eligible are those employees in the unit who have been employed for a total of 30 working days or more within the 12 months immediately preceding the eligibility date, or who have had some employment in that period and have been employed 45 working days or more within the 24-month period immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed."

showed the following results:

Approximate number of eligible voters 174

Number of Void ballots. 2
Number of Votes cast for PETITIONER 62
Number of Votes case for INTERVENOR. 51
Number of Votes cast against participating
labor organization(s) 2
Number of Valid votes counted 115
Number of Challenged ballots 16
Number of Valid votes counted plus
challenged ballots 131

The challenged ballots were sufficient in number to affect the results of the election. However, on June 8, 2004, during the post-election hearing on challenges and objections in this matter, the parties stipulated that seven of the individuals whose ballots were challenged were eligible to vote, and that the challenge to each of their ballots be overruled. (Jt. Exh. 4).[2] Pursuant to this stipulation, these seven ballots were counted, and a revised tally of ballots issued on June 8, 2004 (Bd Exh. 2), showing the following results:

	Original Tally	Challenged Ballots Counted	Final Tally
Approximate number of eligible voters	174		
Number of Void ballots	2	0	2
Number of Votes cast for PETITIONER	62	5	67
Number of Votes case for INTERVENOR	51	1	52
Number of Votes cast against participating labor organization(s)	2	1	3
Number of Valid votes counted	115		122
Number of Challenged ballots	16		9
Number of Valid votes counted plus challenged ballots	131		131

[2] All citations to the transcript will be referred to as "Tr." followed by the appropriate page number. Petitioner's exhibits will be referred to as "Pet. Exh.," the Employer's exhibits as "Er. Exh.," the Intervener's exhibits as "Int. Exh." joint party exhibits as "Jt. Exh.," and Board exhibits as "Bd. Exh."

The remaining undetermined challenged ballots were insufficient to affect the results of the election.

On April 8, 2004, the Employer timely filed objections to the election, a copy of which was thereafter served upon the Petitioner and the Intervenor by the Regional Director. On April 9, 2004, the Intervenor timely filed objections to the election, a copy of which was thereafter served upon the Petitioner and the Employer by the Regional Director. Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the Regional Director, after reasonable notice to the parties to present relevant evidence, completed an investigation of the challenges and objections, and duly considered all evidence submitted by the parties.

On May 21, 2004, the Regional Director issued and served upon the parties her Report on Challenged Ballots and Objections and Order Directing Hearing, in which she concluded that the issues raised by the 16 challenged ballots could best be resolved by a hearing.[3] The Regional Director also concluded that the issues raised by Employer's Objection Nos. 1, 2, 3, 4, and 5, and Intervenor's Objection Nos. 1, 2, 3, 4, and 5 could best be resolved by a hearing.[4]

Pursuant thereto, a hearing was held before the undersigned Hearing Officer in Los Angeles, California, on June 7, 8, 9, and 14, 2004, in Los Angeles, California. All parties were afforded a full and complete opportunity to be heard, to

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[3] As noted above, the challenged ballot issue was resolved by the revised tally of ballots, which issued on June 8, 2004, and which reflected that the remaining undetermined challenged ballots were insufficient to affect the results of the election.

[4] With the exception of Intervenor Objection 5, the Intervenor and Employer Objections are substantively parallel. During the presentation of the Intervenor and the Employer's evidence at the hearing, Intervenor moved to withdraw its Objection 4, and the Employer moved to withdraw its parallel Objection 3. After the conclusion of the presentation of evidence by the Intervenor and Employer, the Employer submitted a

examine and cross-examine witnesses, to present evidence pertinent to the issues, and to argue orally before the conclusion of the hearing. The substantive portion of this report will focus on Intervenor's Objection Nos. 1, 2, 3, and 5.

Following a hearing where all parties presented witnesses and evidence, I conclude that Intervenor's Objection Nos. 1, 2, 3, and 5 should be overruled. I recommend that Intervenor's withdrawal request of Intervenor's Objection No. 4 be approved. I recommend that Employer's withdrawal request of all Employer Objections be approved. I recommend that a Certification of Representative be issued to Petitioner.

PREFACE

The recitation of facts in this report, unless otherwise noted, is based on a composite of the credited aspects of the testimony of all witnesses, unrefuted testimony, supporting documents, undisputed evidence, and careful consideration of the entire record, including the oral argument of the Intervenor and the Petitioner.

Although each iota of evidence, or every argument of counsel, is not individually discussed, all matters have been considered. Omitted matter is considered either irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict the findings of fact, that evidence has not been overlooked. Instead, it has been rejected as incredible or of little probative value. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of witnesses at the hearing. 3-E Company v. NLRB, 26 F.3d 1, 3, 146 LRRM 2574, 2575 (1st Cir. 1994); NLRB v. Brooks Camera, Inc., 691 F.2d 912, 915, 111 LRRM 2881, 2883 (9th Cir. 1982); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45,

written request to withdraw all of its remaining objections. (Bd. Exh. 3). No party objected to these requests. I informed the parties that I would be recommending the approval of these withdrawal requests.

49, 76 LRRM 2224, 2226 (9th Cir. 1970). Failure to detail all conflicts in testimony does not mean that such conflicting testimony was not considered. Bishop and Malco, Inc. d/b/a Walkers, 159 NLRB 1159, 1161 (1966). Further, the testimony of certain witnesses has been only partially credited. Kux Manufacturing Co. v. NLRB, 890 F.2d 804, 132 LRRM 2935 (6th Cir. 1989); NLRB v. Universal Camera Corp., 179 F.2d 749, 754, 25 LRRM 2256 (2nd Cir. 1950), *rev'd on other grounds*, 340 U.S. 474, 27 LRRM 2373 (1951).

BOARD STANDARDS

"[B]allots cast under the safeguards provided by Board procedure [presumptively] reflect the true desires of the participating employees." NLRB v. Zelrich Co., 344 F.2d 1011, 1015 (5th Cir. 1965). Thus, the burden of proof on parties seeking to have a Board-supervised election set aside is a "heavy one." Harlan #4 Coal Co. v. NLRB, 490 F.2d 117, 120 (6th Cir. 1974), cert denied, 416 U.S. 986 (1974); see also NLRB v. First Union Management, 777 F.2d 330, 336 (6th Cir. 1985)(per curiam). This burden is not met by proof of misconduct, but "[r]ather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." NLRB v. Bostik Div., USM Corp., 517 F.2d 971, 975 (6th Cir. 1975) (quoting NLRB v. White Knight Mfg. Co., 474 F.2d 1064, 1067 (5th Cir. 1973).

In Milchem, Inc., 170 NLRB 362 (1968), the Board held that "prolonged conversations" between representatives of any party and prospective voters in the polling area can constitute conduct which will invalidate an election. Although the Board's holding in Milchem is also applicable to conversations between observers and voters,

innocuous comments of a short duration will not be held objectionable. Vista Hill Hospital, 239 NLRB 667 (1978), *enf.* 639 F.2d 479, 106 LRRM 2058 (9th Cir. 1980). Where Milchem is not directly applicable, alleged electioneering is evaluated as to whether, under the circumstances, it substantially impaired the "free choice of voters." Del Rey Tortilleria, Inc., 272 NLRB 1106, 1107 (1978), *enfd.* 823 F.2d 1135, 125 LRRM 3140 (7th Cir. 1987).

In contrast, less weight is accorded to conduct of a non-party, as "neither unions nor employers can prevent misdeeds...by persons over whom they have no control." NLRB v. Griffith Oldsmobile, 455 F.2d 867, 870, 79 LRRM 2650 (8th Cir. 1972), *enfg.* 184 NLRB 722 (1970). As a result, the Board generally will overturn an election based on third-party conduct only when it is so aggravated that it creates a general atmosphere of fear and reprisal rendering a free election impossible. Phoenix Mechanical, Inc., 303 NLRB 888 (1991), citing Westwood Horizons Hotel, 270 NLRB 802 (1984); NLRB v. Aaron Bros. Corp., 563 F.2d 409, 412, 96 LRRM 3261, 3263 (9th Cir. 1977). "There has never been a rule requiring absolute silence among voters waiting to vote." Dumas Bros. Mfg. Co., 205 NLRB 919, 929 (1973).

It must be kept in mind that violation of manual provisions regarding the conduct of an election, are not *per se* grounds for finding objectionable conduct as the manual provisions are merely guidelines and are not binding procedural rules. Queen Kapiolani Hotel, 316 NLRB 655, fn. 5 (1995); Solvent Services, 313 NLRB 645, 646 (1994); Correctional Health Care Solutions, 303 NLRB 835 (1991); Kirsch Drapery Hardware, 299 NLRB 363, 364 (1990); NLRB v. Black Bull Carting, 146 LRRM 2777 (2nd Cir. 1994).

Intervenor Objection No. 1:

The election should be invalidated because the Laborers' directly and indirectly offered to pay people to vote for them[5]

Monetary Payments

The Intervenor alleges that the Laborers' offered to pay and actually paid employees up to an entire day's wages to vote for the Laborers' in the April 2, 2004 election at Karcher, and/or asked a company called Miller Environmental to pay its employees a day's wages to vote for the Laborers' in the April 2, 2004 election at Karcher.

In support of the Objection, Intervenor presented Ruben Torres, a 10-year Karcher employee. Torres testified that on the day of the election one Karcher employee, Jose Romero, told him that Miller Environmental had paid him for the day of election. Torres also provided vague testimony that someone else, whose name he could not recall, said that he was also paid by Miller Environmental to vote that day. No other witnesses testified regarding these alleged payments.

While on cross-examination, Torres claimed never to have spoken to any representative of the Employer or the Intervenor about this testimony before the hearing, on re-direct, Torres changed his testimony and conceded that the previous week, he had in fact met with Employer Representative Joe De Los Santos, Employer Attorney Knee, Intervenor Attorneys Shanley and Shintani, and employee Jose Gonzalez, at which time he discussed the substance of his testimony. Torres' testimony was vague, confused and uncorroborated, and his demeanor was uneasy and nervous.

[5] In oral argument, counsel for the Intervenor did not address this objection as a basis for overturning the election. Rather, counsel for the Intervenor addressed Intervenor's three other remaining objections,

Petitioner presented Gregg Miller, owner of Miller Environmental, who testified in response to the objection. Miller credibly testified that Jose Romero worked a full 8-hour day for Miller Environmental on April 2, 2004, the day of the election. His shift began at 3 p.m. at Wilson High School. Miller also presented Romero's signed time card, which reflected that Romero worked an 8-hour day for Miller on April 2, 2004. Gregg Miller testified that he never offered to pay anyone to vote at the Karcher election, and that no representative of the Laborers' ever asked him to pay people to vote at the Karcher election.

T-Shirts and Jackets[6]

It is undisputed that about approximately 75 large and extra large cotton t-shirts with the Laborers' logo were brought to the Karcher facility and distributed to employees on the day of the election.[7] Invoices establish that these T-shirts cost $6.15 each.

It is also undisputed that Laborers' Representative Humberto Gomez gave one Laborers' jacket with the Laborers' logo[8] to Union observer Jaime Yanez right before the pre-election meeting on the day of the election. The uncontroverted evidence also establishes that Yanez folded up the jacket and put it out of view of voters during the election. The only other eligible voter present at the meeting was Intervenor observer Jose Gonzalez and Employer observer Arcadio Vasquez.

Objection Nos. 2,3, and 5, as independent or collective grounds for overturning the election. However, inasmuch as Intervenor did not explicitly withdraw Objection 1, it will be addressed herein.

[6] Intervenor alleges that Laborers' T-shirts and jackets were distributed in such a manner to constitute unlawful electioneering in support of Objection 2, rather than explicitly as a gift/payment in support of Objection 1. The distribution of T-shirts/jackets will be considered here, as well as in conjunction with Objection 2.

[7] See Pet. Exh. 1

[8] See pictures of jacket at Intervenor's Exhibit 13. In this regard, at the end of the hearing on June 14, 2004, the record was left open solely for the limited purpose of receiving into evidence Intervenor's Exhibit 13, which the parties agreed would be a picture of the front and back of the jacket, to be taken by Petitioner, and sent to the parties and the hearing officer. On June 17, 2004, the Hearing Officer received the picture into evidence, and the record in this matter thereby closed.

Finally, it is undisputed that Laborers' representative Humberto Gomez also gave one of the same Laborers' jackets to Karcher employee/eligible voter Ruben Salazar before the election began. The credible evidence established that Gomez gave Salazar the jacket as soon as he and Salazar arrived at the parking lot of the Karcher facility that morning, at about 3:30 a.m., that it was cold out, and that only one other employee eligible to vote in the election was present at that time. Invoices establish that the Laborers' purchased the jackets in 1997 at a cost of $15.89 each. [9]

Record evidence establishes that jackets were only distributed to Yanez and Salazar during the critical period between the filing of the petition on February 24, 2004, through the date of the election on April 2, 2004.

Discussion re: Intervenor Objection No. 1:

With regard to monetary payments, in Broward County Heath Corp. dba Sunrise Rehabilitaiton Hosptial,[10] 320 NLRB 212 1995, the Board held that monetary payments offered to employees as a reward for coming to a Board election that exceed actual transportation expenses is objectionable. Accord: Lutheran Welfare Services, 321 NLRB 915 (1996); Rite Aid Corp, 326 NLRB 924 (1998).

Here, there is no credible evidence of any direct monetary payments to eligible voters by the Laborers', or indirect monetary payments to eligible voters by the Laborers' via Miller Environmental. I discredit the vague, confused, and uncorroborated hearsay testimony of Jose Romero, whose demeanor I found to be uneasy and nervous. I credit the testimony of Gregg Miller, who testified in a candid and straightforward manner, and who denied making any payments to employees to vote in the election at Karcher and

[9] The uncontroverted evidence establishes that about 7500 of these jackets were purchased by the

who denied that any representative of the Laborers' ever asked him to pay people to vote at the Karcher election. Miller's testimony was corroborated by the timecard he provided, which revealed that Jose Romero worked 8 hours for Miller on the day of the election.

With regard to non-monetary gifts the Board considers whether the item, under the circumstances: (1) was of sufficient value; and (2) appeared to employees as a reward such that it would have a "tendency to influence" the outcome of the election. Gulf-States Canners, Inc., 242 NLRB 1326 (1979); Owens-Illinois, Inc., 271 NLRB 1235 (1984). The test is an objective one.

With regard to T-shirts, the Board has long held that the distribution of T-shirts is not considered a payment to voters because T-shirts are of insufficient value to serve to improperly influence employees. See e.g. , R. L. White Co., 262 NLRB 575, 576 (1982); Nu Skin International Inc., 307 NLRB 223 (1992); and NLRB v. Coca-Cola Bottling Co., 132 F.3d 1001 (4th Cir. 1997). Accordingly, under established Board precedent, here the distribution of Laborers' cotton T-shirts valued at approximately $6.15 were of insufficient value to be considered a payment to voters, and did not have a "tendency to influence" the outcome of the election.

With regard to the two jackets distributed by Laborers' representative Gomez, one was given to the Laborers' observer, with the only other eligible voters present being the Employer and Intervenor observers. The other was given to an employee in the presence of only one other employee. Here, the low value of the jackets, the fact that only two jackets were distributed, before the election began, to only two eligible voters, with a

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Laborers in 1997, and the bulk were given to members as a gift at about that time.

[10] This case was cited by Intervenor in its written objections filed on April 9, 2004.

total of only three other eligible voters (two of whom were observers) witnessing the distribution weighs against the appearance of a "reward" to employees that would have a "tendency to influence" the outcome of the election. Gulf-States Canners, Inc., 242 NLRB 1326 (1979); Owens-Illinois, Inc., 271 NLRB 1235 (1984). The instant case is distinguishable from the facts in Owens where the Petitioner's business representative handed out 25 jackets with union insignia to employees who came to his room at the Ramada Inn during the period between the first and second voting sessions, and before five or six of these employees had voted. Thus, the Board in Owens found that the jackets appeared to be a reward for those who voted for Petitioner, and an inducement for those who had not yet voted to do so in the Petitioner's favor.

I conclude that the distribution of the two jackets in these circumstances did not constitute a benefit that would have a "tendency to influence" the outcome of the election.

Accordingly, I recommend that Intervenor's Objection No. 1 be overruled.

Intervenor Objection No. 2:

The Laborers' Representatives Conducted
Prohibited Electioneering

The Intervenor maintains that the Petitioner engaged in unlawful electioneering by: (1) keeping a list of names of those who voted and checking them off as they came to vote;[11] and (2) distributing T-shirts and jackets en masse in a circus-like environment in the streets/parking area outside of the Karcher facility, while the election was taking place inside the lunchroom of the facility.

[11] Intervenor's Attorney did not address this claim in closing argument. However since this aspect of the objection was not specifically withdrawn, it will be addressed herein.

Intervenor presented nine witnesses in support of Objection 2, including Intervenor Business Representative James Swindell, Employer Senior Vice President Joe De Los Santos, Petitioner President Luis Robles, and Petitioner Secretary-Treasurer Jaime Hernandez, and five employees/eligible voters— Jose Gonzales (Intervenor Observer), Jorge Fimbres, Manuel Morales, Luis Gomez, and Christian Ortec.[12] Several of Intervenor's witnesses supported Petitioner's position that no objectionable conduct occurred, and Petitioner also presented Director of Organizing Humberto Gomez in support of its position.

Keeping a List of Names

It is well established that keeping a list of names, apart from the official voting list is generally prohibited. Piggly-Wiggly, 168 NLRB 792 (1967). However, the Board will not set aside an election if the list making does not have a reasonable tendency to coerce employees. Whether the list making has a reasonable tendency to coerce employees is established by determining whether the employees knew that their names were being recorded. Chrill Care, Inc., 340 NLRB No. 123 (2003). Employee knowledge can be either affirmatively shown or inferred from the circumstances. Piggly-Wiggly.

Intervenor presented two witnesses, Intervenor Business Representative James Swindell and Employer Senior Vice President Joe De Los Santos, both of whom provided vague testimony about seeing someone with a clipboard making markings as

[12] Intervenor's request to enforce subpoenas of an additional 22 witnesses who it hoped could provide additional evidence in support of Objection 2 was denied. Intervenor represented that the witnesses were subpoenaed to testify solely with regard to Objection 2, and conceded that representatives of the Intervenor had not spoken to these potential witnesses and did not know what their testimony would be, or even if they had testimony in support of Objection 2.(Tr. 333-334). Inasmuch as nine witnesses had already been presented, it was concluded that such evidence would be cumulative. Furthermore, in these circumstances it

voters entered the parking lot at Parking Entrance 1 on Dupont Drive.[13] Both witnesses

was concluded that the Board policy of ensuring expeditious resolution of questions concerning representation outweighed enforcement of subpoenas regarding unknown testimony.(Tr. 408-409).

[13] See diagrams of Employer's facility received into evidence at the hearing pursuant to the agreement of the parties.

conceded that they did not know who the individual with a clip board was, and that they were too far away (60 to 70 feet) to see whether or not there was paper on the clip board or to see what kind of marking were being made. No employee witnesses testified about seeing any such individual with a clipboard making markings, or anyone engaging in any form of list keeping.

Petitioner witnesses uniformly denied that there was any Petitioner representative keeping a list of names of employees coming to vote.

Accordingly, the vague testimony presented is insufficient to establish that there was any objectionable conduct in the form of prohibited list making on the day of the election.

Other Alleged Objectionable Electioneering[14]

The election took place on Friday, April 2, 2004, from 5:00 a.m. to 7:30 a.m., in the lunchroom of the Employer's facility, located at 2300 Orangewood Avenue, Anaheim California. The following employees served as observers in the election: Arcadio Vasquez for the Employer; Jaime Yanez for Petitioner; and Jose Gonzalez for the Intervenor. Two Board agents were conducting the election.

The layout of the area of the Employer's facility was also stipulated to by the parties, and various diagrams of the facility reflecting the election site in the lunchroom, the warehouse outside the lunchroom, the open storage yard outside the warehouse, the adjacent parking area, and the adjacent streets were received into evidence.

It is undisputed that in order to enter the voting area, an employee had to enter the

[14] Inasmuch as most of the disputes in the evidence are immaterial to a resolution of the objection, it is unnecessary to review each individual's testimony. Rather, as noted in the preface above, the facts recited here are based on a composite of the credited aspects of the testimony of all witnesses, unrefuted

warehouse through one door (door #1) and then transverse a corridor through another door (door #2). Finally, the employee would enter the voting area (lunchroom) through a third door (door # 3). There are no windows in the lunchroom. Indeed, once an employee is between door 1 and door 2, the gate area outside that separates the parking area from the open storage yard is not visible. The gate is approximately 70 feet away from the entrance to the facility at door #1. Parking Entrance # 1 at DuPont and Orangewood is about 30 feet away from the gate. The area in the parking lot where Intervenor representative Swindell, Employer representatives De Los Santos and Harold, and Petitioner Representative Gomez stationed themselves during most of the election is also about 30 feet from the gate.

As discussed above, it is undisputed that that Petitioner representative Humberto Gomez gave a Laborers' jacket to Karcher employee/eligible voter Ruben Salazar before the election began. The credible evidence established that Gomez gave Salazar the jacket as soon as he and Salazar arrived at the parking lot of the Karcher facility that morning, at about 3:30 a.m., that it was cold out, and that only one other employee that was eligible to vote in the election was present at that time.

It is also undisputed that Laborers' Representative Humberto Gomez gave one Laborers' jacket to Union observer Jaime Yanez right before the pre-election meeting on the day of the election. The uncontroverted evidence also establishes that that Yanez folded up the jacket and put it out of view of voters during the election. The only other eligible voter present at the meeting was Employer observer Jose Gonzalez.

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testimony, supporting documents, undisputed evidence, and careful consideration of the entire record, including the oral argument of the Intervenor and the Petitioner.

The Board Agents did not designate a "no-electioneering" area at the pre-election meeting or at any other time.

The credited and relevant testimony reveals that Laborers' T-shirts, brought to the facility in boxes by Laborers' representatives, were distributed to about 75 individuals during the hours of the election. The T-shirts were distributed near Parking Entrance #1 at DuPont Drive, near Orangewood Avenue by one to two eligible voters/employees, including Jorge Fimbres, who volunteered to distribute them. Traffic was backed up during the hours of the election. Intervenor witnesses provided vague testimony that individuals in orange shirts were talking to people and stuffing shirts into cars.

About 45 minutes into the election, Board agent came out the gate area that separates the open storage yard and the parking area at the Employer's facility. Employer supervisors were gathering their crews there for the day, and some employees were wearing orange Laborers' shirts. The Board agent stated that persons should not be congregating at the gate. Accordingly, Employer Representative Harold directed the supervisors not to assemble workers there. The Board agent then questioned whether the Employer's representatives should be in the parking area. After some discussion, the Board agent noted that representatives of all parties were at the location so he did not see a problem. There is a dispute as to whether Employer Representative De Los Santos complained to the Board agent about Laborers' representatives stopping cars. Assuming such complaint was made, De Los Santos represented that the Board agent stated that as long as people were staying away from the gate, he was not going to say anything. The Board agent did not make any statements about the distribution of T-shirts at parking Entrance 1, the wearing of Laborers' T-shirts, or otherwise indicate any problem with

any other conduct.

One witness, observer Jose Gonzales, testified that during the election, in the polling area in the lunchroom at the Employer's facility, employee Modesto Romero stated "Let's Go 300" while waiting in line to vote. Present at that time in line in the polling area were about five other employees/eligible voters who were members of Romero's family. No evidence was presented that Romero was a representative, employee or otherwise an agent of Petitioner. Petitioner witnesses credibly represented that he was not. Gonzales also represented that employee Carlos Merlos came into the lunchroom, lifted his hands and said "882." Present were about five other employees/eligible voters waiting in line to vote. No evidence was presented that Merlos was a representative, employee or otherwise an agent of Petitioner. Petitioner witnesses credibly represented that he was not. Gonzales also vaguely testified that on three or four occasions he saw individuals in line with Laborers' T-shirts say to other voters "Here. Take it. Put it on." Gonzales could not identify who these individuals were, and could not recall how voters responded. Gonzales stated that the Board agents conducting the election ignored and did not respond to any of these specific comments or conduct. I found Gonzales' demeanor nervous, uneasy, and eager to please the Intervenor and Employer. I noted several occasions where he looked over at the Employer and Intervenor representatives during cross-examination by Petitioner.[15]

Discussion re: Other Alleged Objectionable Electioneering:

As noted above, in Milchem, Inc., 170 NLRB 362 (1968), the Board held that "prolonged conversations" between representatives of any party and prospective

voters in the polling area or in line to cast their ballots can constitute conduct which will invalidate an election. This rule is applied strictly, regardless of the contents of the conversations, to effectuate the Board's desire to avoid electioneering in these areas, so the final minutes before an employee casts his vote are his own and as free from interference as possible." Here there is no evidence of any such prolonged conversations in the polling area by any representative of Petitioner with employee/eligible voters.

With regard to other alleged electioneering by representatives of a party or a third party, the Board makes a judgment, based on all the facts and circumstances, whether the electioneering substantially impaired the exercise of free choice so as to require the holding of a new election. Dayton Hudson Dept. Store Co., 987 F.2d 359, 364 (1993). In making that judgment, the Board considers a number of factors, such as: (1) whether the conduct occurred at or near the polls; (2) the nature and extent of the alleged electioneering; (3) whether it is conducted by a party to the election or employees; (4) whether the electioneering is conducted with a designated "no-electioneering" area, or contrary to the instructions of the Board Agent; (5) whether the conduct area was visible to those in the polling area; and (6) whether the voters had already voted. Boston Insulated Wire & Cable Co., 259 NLRB 1118 (1982); U-Haul Co. of Nevada, Inc., 341 NLRB No. 26 (2004) (Union representative's conversations with voters in parking lot did not constitute unlawful electioneering as they did not occur in a designated no-electioneering area, in the polling area, the waiting area, or near the line of voters).

Here, the vast majority of all alleged electioneering was by third-party employee/eligible voters. The only conduct that occurred at or near the polls was that

[15] It should be noted that the Intervenor's Attorney did not address this conduct in closing argument in support of Objection 2. However inasmuch as the testimony was presented by the witness in support of the

testified to by Intervenor observer Jose Gonzales, whose testimony I discredit based on his demeanor and eagerness to please the Employer and the inherent improbability that a Board agent would ignore rather direct an employee to stop making pro-union comments or to stop distributing union T-shirts while waiting in line. However, even if Gonzales' testimony were credited it would be insufficient to rise to the level of objectionable conduct inasmuch as Modesto, Merlos, and each of the unidentified other individuals were eligible voters, and NOT agents of Petitioner. As the Board has held, there has never been a rule requiring absolute silence among voters waiting to vote. Dumas Bros. Mfg. Co., 205 NLRB 919, 929 (1973). Moreover, the Board generally will overturn an election based on third-party conduct only when it is so aggravated that it creates a general atmosphere of fear and reprisal rendering a free election impossible. Phoenix Mechanical, Inc., 303 NLRB 888 (1991), citing Westwood Horizons Hotel, 270 NLRB 802 (1984); NLRB v. Aaron Bros. Corp., 563 F.2d 409, 412, 96 LRRM 3261, 3263 (9th Cir. 1977). None of these aggravated circumstances are present here.

The remaining alleged unlawful electioneering (primarily distribution of T-shirts by employee volunteer(s)), all occurred outside the polling area, was not visible to those inside the warehouse and/or waiting in line in the lunchroom, and was not part of any designated no-electioneering area. Rather it largely consisted of distributing T-shirts near parking entrance 1, which was approximately 100 feet away from the entrance to the warehouse. While some employees temporarily congregated in the area, they dispersed when instructed by one of the Board agents.

Finally, with regard to the distribution of the two jackets by Petitioner's Director

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Objection, it is addressed herein.

of Organizing Humberto Gomez, as discussed above in conjunction with Objection 1, one jacket was given to the Laborers' observer, with the only other eligible voter present being the Employer and Intervenor observers. The other was given to an employee in the presence of only one other employee. Here, in sharp contrast to Owens, discussed above, the fact that only two jackets were distributed, before the election began, to only two eligible voters, with a total of only three other eligible voters (two of whom were observers) witnessing the distribution weighs against the appearance of a "reward" to employees that would constitute unlawful electioneering having a "tendency to influence" the outcome of the election. Gulf-States Canners, Inc., 242 NLRB 1326 (1979); Owens-Illinois, Inc., 271 NLRB 1235 (1984).

Accordingly, I conclude that Intervenor has failed to meet its burden of establishing that the alleged unlawful electioneering substantially impaired the exercise of free choice so as to require the holding of a new election. I recommend that Intervenor's Objection No. 2 be overruled.

Intervenor Objection No. 3

The Excelsior List's Omission of Names of Eligible Voters Prejudiced the Carpenter's Ability to Communicate with All Voters:

At the hearing, the parties stipulated that seven of the individuals whose ballots were challenged were eligible to vote, and that the challenge to their ballot should be overruled. Pursuant to the stipulation, these seven ballots were counted and a revised tally of ballots issued. Of these seven ballots, five were cast for Petitioner, one was cast for the Intervenor, and one was cast against participating labor organizations. Accordingly, the final tally resulted in 67 votes cast for Petitioner and 52 for Intervenor,

with the remaining 9 challenged ballots insufficient in number to affect the outcome of the election.

At the hearing, the Employer testified that in addition to the seven employees whose ballots were counted pursuant to the stipulation, another six employees were inadvertently left off the eligibility list. Payroll records were introduced into evidence to support this position. The record reveals that at the pre-election conference at Region 21 several days before the election, Petitioner tried to obtain a stipulation from the Employer and Intervenor for the inclusion of these individuals on the eligibility list.[16] However, both the Employer and Intervenor objected, maintaining that these individuals were ineligible. No witness provided credible testimony that demonstrated the individuals were definitively included or excluded from the unit.

Discussion re: Intervenor Objection No. 3:

In evaluating the significance of mistakes in the eligibility list affecting the outcome of an election, the Board looks to the totality of the circumstances. The standard typically applied is whether or not, under the circumstances of a particular case, the employer has 'substantially complied' with the Excelsior requirements. Woodman's Food Markets, Inc., 332 NLRB 503 (2000). To establish substantial compliance, the Board considers, *inter alia* (1) the percentage of omissions (the number of omissions as a percentage of the total number of eligible viewers); (2) the employer's explanation for the omissions; and (3) the potential prejudicial effect on the election as reflected by whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election.

Here, the percentage of omissions is small. If the additional six potentially eligible voters is added to the seven who the parties stipulated were eligible and whose ballots were counted, there are potentially a total of thirteen omissions from the eligibility list. If those thirteen are added to the total eligible voters of 174, there then become a total of 187 eligible voters. The 13 omissions represent 6.9% of the 187 eligible voters. In Bardon Enterprises, 326 NLRB No. 48 (1998), the Board declined to rule on whether Petitioner's inability to communicate with 22% of the eligible voters, a far larger percentage than in the instant case, constituted sufficient lack of compliance with the Employer's Excelsior duty to constitute objectionable conduct sufficient to overturn the election.

Furthermore, here, there is no evidence of any intentional error by the Employer. Rather the Employer testified that any potential mistakes were inadvertent.

Hypothetically, if all thirteen disputed voters were eligible, and all thirteen voted for Intervenor, the outcome of the election would have been affected. However, in the circumstances of this case, where two unions were involved, where the Petitioner tried to obtain a stipulation days before the election that ten of the thirteen potentially eligible voters be included on the eligibility list, where both Intervenor and the Employer opposed the stipulation, and where it is still uncertain whether six of these thirteen should appropriately be included in the unit and thus on the eligibility list, it is highly unlikely that there was a prejudicial effect on the outcome of the election.

Accordingly, based on the circumstances of this particular case, including the small percentage of omissions, the employer's explanation for the omissions, and the

[16] See Int. Exh. 6, which includes, *inter alia*, four of the individuals whose ballots were counted during the

unlikely prejudicial effect on the election, I conclude there was substantial compliance with the Excelsior requirements. I recommend that Intervenor's Objection No. 3 be overruled.

Intervernor Objection No. 5

The Laborers' coerced voters by sending them a threatening letter

It is undisputed that Laborers' Secretary-Treasurer Jaime Hernandez sent a letter dated March 24, 2004, to 123 individuals eligible to vote in Karcher election who had previously indicated they wished to resign from the Laborers' Union. The letter addressed the effects of resignation, and stated, *inter alia*,: AS A NONMEMBER, YOU WILL NOT BE ALLOWED TO USE THE UNION HRIING HALL OR TO CONTINUE TO BE EMPLOYED WITH ANY CONTRACTOR WITH A COTNRACT WITH THIS UNION which contains a union security clause unless you pay either a fee equal to dues or amount equal to dues less any costs not [sic] representation.[17]

It is also undisputed that, in response, about 97 of these 123 individuals sent back to Hernandez a letter similar to the sample return letter attached to Hernandez's March 24, 2004 letter. The return letters stated that the individual was directed to sign a document in which he resigned from Laborers' Local 300, and that he believed from what the Carpenters Union and dispatcher for Karcher Environmental told him that he would be unable to continue to work for Karcher unless he signed the resignation. The letter continued to state that now since he has learned that he may continue to be a member of Laborers' Local 300 if he wants to be, and that it is illegal for Karcher to fire him on that

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hearing pursuant to stipulation, and the additional six individuals that Intervenor now maintains were inappropriately left off the Excelsior list.

[17] See Intervenor Exhibit 2, p. 1.

basis, he wishes to remain a full member of the Laborers' Union and would like his previous resignation to be disregarded.[18]

Intervenor filed an unfair labor practice charge based on Hernandez's March 24, 2004 letter, claiming that the Laborers' violated Section 8(b)(1) and (2) of the Act by writing to employees that non-members would not be able to use its hiring hall unless they paid an unlawful fee. The charge was administratively dismissed and is presently pending on appeal. (See Bd Exh. 4(a)-(c)).

Discussion re: Intervenor Objection No. 5:

I find that the March 24, 2004 letter, when read in its entirety, gives members a lawful explanation of their rights under Communications Workers v. Beck, 487 U.S. 735 (1988), and its progeny, and does not constitute an unlawful threat that non-members would not be able to use the Laborers' hiring hall unless they pay a unlawful fee. Accordingly, I conclude that Petitioner's March 24, 2004 letter does not constitute objectionable conduct interfering with the results of the election. I recommend that Intervenor Objection No. 5 be overruled.

Recommendation

Having made the above findings and conclusions, viewing the alleged conduct individually and cumulatively, and upon the record as a whole, I recommend that the withdrawal of Intervenor's Objection No. 4 and Employer's Objections in their

[18] See Intervenor Exhibit 2, p. 2 (letter to Hernandez from member).

entirety be approved. I also recommend that Intervenor's Objection Nos. 1,2,3, and 5 be overruled. Finally, I recommend that a Certification of Representative be issued to Petitioner. [19]

Dated at Los Angeles, California, this 12th day of July, 2004.

Julie B. Gutman
Hearing Officer

[19] Under the provisions set forth in Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. 20570. Exceptions must be received by the Board in Washington by close of business on July 26, 2004.